IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1976

Docket Nos. 76-180, 76-183, 76-5193 and 76-5200

J. HENRY SMITH, individually and as administrator of the NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Appellants,

(Additional parties listed on next page)

On Appeal from the United States District Court for the Southern District of New York

BRIEF OF NEW YORK CITY APPELLANTS

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-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., et al.,
Appelles.

BERNARD SHAPIRO, individually and as Executive Director of the New York State Board of Social Welfare, et al.,
Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., et al.,
Appellees.

NAOMI RODRIGUEZ, etc., et al.,
Appellants,

-against-

ORGANIZATION OF FOSTER FAMILIES FOR EQUALITY AND REFORM, etc., et al.,
Appellees.

DANIELLE and ERIC GANDY, etc., et al.,
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BRIEF OF THE NEW YORK CITY APPELLANTS

PRELIMINARY STATEMENT

This is an appeal from an order and judgment entered on April 14, 1976, by

a three judge court for the Southern District of New York which declared Sections 383(2) and 400 of the New York Social Services Law and a regulation promulgated thereunder, 18 N.Y.C.R.R. §450.14 [now §450.10], as presently applied, to be in violation of the constitutional rights of foster children in a certified class. The order enjoined the municipal appellants from removing or authorizing the removal of any foster children from foster homes in which they have lived continuously for more than one year without notice and a hearing at which the foster parents, the foster child and the biological parents could present evidence.

On May 24, 1976, this Court stayed the enforcement of the order and judgment of the three judge court pending the docketing of the appeals. The New York City

appellants' jurisdictional statement was filed on August 6, 1976. This Court noted probable jurisdiction on October 12, 1976.

OPINION BELOW

The opinion of the three judge court is reported at 418 F. Supp. 277.

JURISDICTION

This appeal is from an order and judgment of a three judge court granting a permanent injunction and declaring unconstitutional state statutes and regulations having statewide applicability. The judgment and order of the three judge court of the District Court for the Southern District of New York was filed on April 14, 1976. The New York City appellants filed a notice of appeal to this Court

on June 9, 1976. Jurisdiction is conferred on this court by title 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Does the due process clause constitutionally require state and municipal officials to afford foster children hearings before removing such foster children from their foster homes?

2. Assuming, arguendo, that due process does require a prior hearing, does the procedure promulgated by the City of New York, which procedure provides a hearing for all foster parents who request it, except where the child is being returned to his natural parent, or where there is an emergency and where the child has not lived in the foster parents' house for more than one year, satisfy the requirements of due process?

STATEMENT OF CASE

We incorporate by reference the factual statement in the brief on behalf of the appellant natural parents.

SUMMARY OF ARGUMENT

(1)

The requirements of due process are flexible and differ in response to the nature of the proceeding and the character of the rights involved. Hannah v. Larche, 363 U.S. 420, 440 (1960). This Court has invoked procedural due process so as to require a hearing where interests were found to be fundamental, such as where government action deprived individuals of the very means they needed to survive. Goldberg v. Kelly, 397 U.S. 254 (1970).

In the instant case, the interest of foster child in the foster care relationship with a specific foster family is adequately protected by the challenged administrative procedures and existing court remedies. The administrative procedures require that foster parents to be given ten days notice of a removal of a foster child from their home and an opportunity for an administrative conference before removal. After the child is removed the foster parents can request a fair hearing. The determination after the fair hearing can be reviewed in the New York State Supreme Court in an Article 78 proceeding.

The New York State Legislature has authorized periodic review by the New York City Family Court of all children in foster care for a period of 18 months.

Foster parents are permitted to participate in this proceeding. McKinney's New York Social Services Law § 392.

In addition, foster parents can bring a habeas corpus proceeding in the Family Court or the Supreme Court requesting that the child be returned to them. Foster parents also have standing to initiate a proceeding to terminate the natural parent's custody of a child on the ground of permanent neglect. McKinney's Family Court Act §§614, 615.

A pre-removal hearing would not necessarily benefit the foster child, and very likely would subject the child to emotional strain as a consequence of his participation. The questionable value of such a hearing does not warrant the substitution

a of new procedure for the existing procedures, which properly rely on the expertise of the social service workers. The presumption of regularity of their determinations in removing children from a foster home is supported by the statistics relating to S.S. Procedure No. 5, voluntarily instituted by the City of New York in August 5, 1974. That procedure permits foster parents to request a full trial type hearing before a child is removed from their home. If such a request is made, the child is not removed until a hearing has been held and a decision rendered. Since this procedure was instituted there have been only 26 hearings. There are approximately 2800 transfers a year.

Assuming, arguendo, that due process does require a hearing before a child can be removed from a particular home, the procedures promulgated by the City of New York on August 5, 1974, satisfy the requirements of due process. The majority on the three judge court objected to the City's procedures because the hearing would only be provided at the request of the foster parents, no hearing would be provided where the child was to be transferred to another foster home and the natural parents would not be a party to the pre-removal hearings.

The City's procedure properly requires that the foster parents request a hearing. If they agree to the transfer there is no purpose to the hearing.

With respect to the return of the child to the natural parent, the procedures properly do not require a hearing. In New York State, in the absence of abandonment, a statutory surrender or a judicial finding of unfitness, the child must be returned to his natural mother. Spence Chapin Adoption Service v. Polk, 29 NY 2d 196, 199, 274 N.E. 2d 431, 433 (1971). The due process hearing ordered by the court below would require the natural parents to justify their right to their children. This would be contrary to the purpose of the foster care program, which is to return children to their natural parents as soon as the parents are ready to care for them.

ARGUMENT

DUE PROCESS DOES NOT REQUIRE THAT A FOSTER CHILD, IN A FOSTER HOME CONTINUOUSLY FOR MORE THAN ONE YEAR, BE GIVEN A HEARING BEFORE REMOVING THE CHILD FROM THE FOSTER HOME. THE EXISTING ADMINISTRATIVE AND JUDICIAL PROCEDURES IN NEW YORK STATE WHICH INCLUDE A TEN DAY NOTICE AND ADMINISTRATIVE CONFERENCE BEFORE REMOVAL, A FAIR HEARING AFTER REMOVAL AND VARIOUS REVIEW PROCEDURES IN THE TRIAL COURTS OF NEW YORK STATE, ADEQUATELY PROTECT THE RIGHTS OF THE FOSTER CHILD.

ASSUMMING, ARGUENDO, THAT DUE PROCESS DOES REQUIRE A PRIOR HEARING, THE PROCEDURE PROMULGATED BY THE CITY OF NEW YORK PROVIDING A HEARING FOR ALL FOSTER PARENTS WHO REQUEST A HEARING, EXCEPT WHERE THE CHILD IS BEING RETURNED TO HIS NATURAL PARENT, WHERE THERE IS AN EMERGENCY OR WHERE THE CHILD HAS NOT LIVED IN THE FOSTER PARENTS' HOME FOR MORE THAN ONE YEAR, SATISFIES DUE PROCESS.

We adopt the arguments for reversal presented by the other

appellants. We will present some additional comments and arguments which we believe should also be presented for consideration.

(1)

Article III, Section 2, clause 1 of the United States Constitution limits the exercise of judicial power to "cases and controversies". In the instant case, the right of a foster child to a pre-removal hearing was not urged upon the three judge court by any party or its attorney. In the District Court, the court appointed attorney for the foster children urged that the challenged procedures were adequate to protect the rights of the foster children.

In addition, the relief granted by the three judge court was not requested by any party or his attorney. The New York Civil Liberties Union, the attorney

for the plaintiff foster parents, which originally brought the action on behalf of foster children as well, only sought relief that would permit foster parents who requested a hearing to be given such a hearing before removal of the child.

It would appear that the foster children do not have a sufficient stake in the outcome of the litigation to satisfy the case or controversy requirement. See O'Shea v. Littleton, 414 U.S. 488, 493 (1974); Sierra Club v. Morton, 405 U.S. 727, 731-733(1972).

(2)

With respect to the merits, it is submitted that due process does not require that an evidentiary hearing should be accorded a foster care child who has continuously resided in a foster

home for more than one year before such child is removed from the foster home.

The requirements of procedural due process are flexible and differ in response to the nature of the proceeding and the character of the rights involved. Hannah v. Larche, 363 U.S. 420, 440 (1960). See also, Morrissey v. Brewer, 408 U.S. 471, 481 (1972). In determining whether procedural due process requires an evidentiary hearing, this Court has considered the following factors: the nature of the right or interest that is threatened; the extent to which the proceeding is adversarial in character; the severity and consequences of any action that might be taken and the administrative burden that would be imposed in requiring a hearing. See Mathews v. Eldridge,

424 U.S. 319, 334-335 (1976).

Applying these factors to various factual situations, this Court, where the affected individual has suffered grievous loss, has invoked procedural due process so as to require an evidentiary hearing before interests could be adversely affected by governmental action. A prior hearing has been required where the governmental action deprived individuals of the very means they needed to survive. Goldberg v. Kelly, 397 U.S. 254 (1970).

Similiarly, the individual's right to earn a living in his chosen occupation was determined to be a fundamental right, and therefore a license to engage in that occupation could not be revoked without a hearing. Schware v. Board of Bar Examiners, 353 U.S.

232 (1957). See also Bell v. Burson, 402 U.S. 535 (1971). It is noteworthy that where an individual was not barred from his profession, but only refused re-appointment to a job, this Court held that due process did not require a hearing before the termination of employment. Board of Regents v. Roth, 408 U.S. 564 (1972). Even where the individual had worked in a college system for a period in excess of ten years, this Court held that due process required a hearing only if it could be shown that the individual had the contractual equivalent of job tenure. Perry v. Sindermann, 408 U.S. 593 (1972). See also, Arnett v. Kennedy, 416 U.S. 134 (1974). Cf. Bishop v. Wood, _____ U.S._____ , 48 L.Ed. 2d 684 (1976).

In the instant case, unlike the cases discussed above, the requirement of a due process hearing before the removal of a child from a foster home would impede the foster care program and might well constitute a detriment to the child himself. In addition, even if not a detriment, such hearing would not necessarily aid the administrative determination concerning what is best for the child.

The foster care program in New York State is charged with the responsibility for providing custodial care to children outside their own homes. The public and private agencies participating in the program accept for care children whose parents are temporarily unable to care for them but who are unwilling to place them for adoption. These children are cared for until such time as their own

families can properly care for them. Mtr. of Jewish Child Care Assn. (Sanders), 5 NY 2d 222, 224-225, 156 N.E. 2d 700, 701 (1959). During the period the child is in the foster home, specially trained employees of the public or voluntary agency assist those in the natural home in preparing for the return of the child. Assistance is also given to the foster parents. Foster parents accept the child with the understanding that the child will be returned to the natural parents as soon as possible. Mtr. of Jewish Child Care Assn., supra, 5 NY 2d at p. 225, 156 N.E. 2d at p. 701.

If the public welfare department or voluntary agency determines to remove a child from a foster home it must follow the procedure prescribed in Title 18 N.Y.C.R.R. 450.14 [now 450.10]. That

procedure requires the foster parents to be given ten days notice prior to removal of a foster child from their home. Following the notice, the foster parent may request an administrative conference. The child cannot be removed until three days after the conference.

The three judge court assumed that this procedure would not adequately protect the rights of the foster child. This assumption ignores the presumption that public officials will discharge their duties honestly and in accordance with the rules of law. See F.C.C. v. Schreiber, 381 U.S. 279, 289-291 (1965); Udall v. Washington Virginia and Maryland Coach Co., 398 F. 2d 765, 769 (D.C. Cir., 1968), cert. den. 393 U.S. 1017 (1969).

There is nothing in the record in the instant case to contradict this presumption. The only testimony on the practices of the agencies indicates that the employees of these agencies are only interested in the welfare of the foster children and their decisions as to the foster children are consistent with their responsibilities under the foster care program. See Joint Appendix, pp. 275a, 277a, 285a, 287a-288a, 289a.

The presumption of regularity is supported by the statistical evidence relating to the procedures instituted by the City of New York on August 5, 1974. Pursuant to that procedure, SSC Procedure No. 5, a foster parent can request a trial type hearing before removal. Between August 1974 and June 1976, only 26 foster parents requested hearings.

There are approximately 2800 transfers a year.

An additional factor is that the due process hearing during the pre-removal stage of the administrative process will not necessarily aid in determining what is best for the foster child, and, in addition, may in fact be harmful to the child.

At many such hearings, it can be anticipated, evidence will be adduced indicating merely a conflict in opinion between social workers. The hearing officer, who may in fact be less knowledgeable than the welfare officials who are charged with administering this program, will then choose among the opinions. Under such circumstances, the requirement of a hearing does little to advance the search for truth.

In addition, the child's participation at such a hearing will in most cases not aid the decision making process, and may in fact be harmful. The child, is by no means, always capable of determining what is best for him, and, his presence at the hearing, also attended by the foster parents and, in some cases, the natural parent, will only exacerbate the tensions among the parties.

The requirement of this hearing where the child is being returned to the natural parent is contrary to the purpose of foster care. By interposing this additional procedure before a natural parent can have the child returned to her, the three judge court has frustrated the purpose of foster care, i.e., to return a child to his natural parent as soon as the natural parent is ready to accept the

child. Approximately 75% of all placements are voluntary. If a due process hearing is to be required before the child may be returned to its natural parent, many natural parents who would otherwise voluntarily place their children in foster care may refuse to do so. Indeed, any delay in returning the child to the natural mother upon the mother's request would be contrary to state law. In the absence of abandonment of the child, statutory surrender outstanding, or the established unfitness of the natural mother, neither the court or an authorized agency have the power to deprive the natural mother of custody of her child. See Matter of Spence-Chapin Adoption Service v. Polk, 29 N Y 2d 196, 199, 274 N.E. 2d 431, 433 (1971); (1971); Bennett v. Jeffreys, 40 NY

2d 543, 544, ____ N.E. 2d____ (1976); Mtr. of Teeter v. Pruiksma, 47 AD 2d 101, 104, 364 N.Y.S. 2d 656, 660 (4th Dept., 1975). See also, McKinney's Soc. Serv. Law §384.

In determining that the foster children are entitled to pre-removal hearings, the three judge court has in fact increased the rights of foster parents and decreased the rights of the biological parents. Such a result conflicts with this Court's recognition of the unique rights attaching to the natural family. Compare Stanley v. Illinois, 405 U.S. 645 (1972) and Armstrong v. Manzo, 380 U.S. 545 (1965) with Village of Belle Terre v. Boraas, 416 U.S 1 (1974). See also, Ramos v. Montgomery, 313 F. Supp. 1179 (S.D. Cal., 1970), affd. 400 U.S.

1003 (1971).

Even where the child is being removed from a foster home to be transferred to another foster home, the due process hearing will have an adverse effect on the foster care program. The decision to transfer from one home to another results from the judgments of social workers that such transfer will be of help to the child. A requirement of a hearing will only delay the transfer and deprive the child of this change made for his benefit. In addition, if a hearing is required before any transfer can occur, even where the foster parents have no objection to the transfer, the social workers may be deterred from recommending transfers rather than participate in these hearings.

The present administrative and judicial procedures adequately protect the foster children's rights without unnecessarily encumbering the foster care program and frustrating the purpose for which it was created.

After the administrative conference has been had and the child is removed, the foster parent can request a fair hearing. McKinney's New York Civil Service Law §400. The determination at the fair hearing can be reviewed in an Article 78 proceeding in the New York Supreme Court pursuant to CPLR 7800 et seq.

In addition to these administrative remedies, the New York State Legislature has mandated periodic review and supervision by the Family Court of each child in foster care

for a continuous period of 18 months.* McKinney's New York Social Services Law, Section 392. The authorized agency charged with the care of a foster child is required to file a petition seeking such review. The foster parents are permitted to participate in the Family Court proceeding. The foster parents are entitled to appear and give their opinions to aid the Family Court in determining what future placement would be in the best interests of the child. Section 392.

In addition, the foster parents can bring a habeas corpus proceeding in the New York Supreme Court or the Family Court challenging the authorized

*The original law provided for a twenty four months period which was reduced to eighteen months in 1975. L.1975, Ch. 708.

agency's determination to remove the child. See Matter of Mack, 81 Misc. 2d 802, 367 N.Y.S. 2d 844 (Fam. Ct., Queens Co., 1975). The foster parent can also initiate a proceeding to terminate the natural parent's custody of a child on the ground of permanent neglect. McKinney's Family Court Act §§614, 615. See N.Y. Soc. Serv. Law §383.

(3)

The three judge court cited this Court's decision in Goldberg v. Kelly, 397 U.S. 254 (1970), in support of its position. In Goldberg this Court noted that the crucial factor was that "termination of aid pending resolution of the controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 397

U.S. at p. 264. Two other factors were present in Goldberg: welfare was mandated by federal law and an evidentiary hearing was appropriate because the issue of eligibility would be determined based on eyewitness testimony and documentary evidence regarding sharp factual disputes.

In this case, unlike in Goldberg, the foster children will continue to be provided with foster care services during the pendency of the administrative procedures and subsequent court proceedings. Unlike welfare, foster care service is not a mandated federal program but established by state laws, which laws also provide the conditions under which foster parents accept foster children. In addition, as we discussed above, an evidentiary hearing would probably involve opinion testimony as to what is best for the foster

child.

These challenged procedures properly rely on the expertise of the social service workers who, because of their specialized knowledge and experience, are in the best position to determine if a child should be removed from a foster home. It can be presumed that the workers will act in the child's best interests. These workers have no adverse interest, financial or otherwise, which would be furthered by removing a child from a particular foster home. In contrast, in Goldberg, the municipality had a financial interest in terminating a recipient's benefits as soon as possible.

In Mathews v. Eldridge, 424 U.S. 319 (1976), this Court, in holding that a hearing was not required before terminating disability benefits, distinguished

Goldberg, noting that the determination of eligibility for disability benefits is best determined by medical personnel and tests, rather than an evidentiary hearing.

(4)

Tnis Court has recognized the principle that a court should not substitute its social and economic beliefs for the judgment of a state legislature under the authority of the due process clause. Ferguson v. Skrupa 372 U.S. 726 (1963). Consistent with Ferguson, this Court recently in Paul v. Davis, 424 U.S. 693 (1976), in dismissing a §1983 action based on defamation, recognized that a plaintiff has a heavy burden to sustain in order to implicate a liberty interest sufficient to invoke procedural due process. See also, Meachum v. Fano, ___ U.S. _____, 49 L.Ed. 2d 451 (1976).

In the instant case the District Court has required pre-removal hearings for every child who has continuously resided in a foster home for more than one year. Under New York State law, the Family Court is required to review the status of every child who has been in foster care for a continuous period of eighteen months. McKinney's New York Social Services Law §392. As pointed out above, children in foster care more than one year but less than eighteen month can have their status reviewed in various administrative or court proceedings.

Under these circumstances, the foster care program, established by New York State to aid troubled families, should not be altered by a federal court under the authority of the due

process clause in the absence of any showing of grave abuses under the existing procedures.

(5)

Assuming, arguendo, that due process does require a hearing before a foster child can be removed from the foster parents, it is submitted that the procedure promulgated by the City of New York on August 5, 1974, during the pendency of this court proceeding, satisfies the requirements of due process. The procedure is set forth as Appendix C annexed to the Jurisdictional Statement of the Municipal Appellants. The City's procedure provides for a trial type hearing modeled after a state fair hearing. The parents are permitted to have counsel, to present evidence and to cross-examine opposing witnesses.

The three judge court objected to the City's procedures because (a) the hearing would only be provided at the request of the foster parents; (b) no hearing would be provided where the child was returned to his natural parents; and (c) the natural parents would not be a party to the pre-removal proceedings.

The City's procedure properly requires the foster parents to request a hearing. The purpose of the hearing is to review the reasons for the agency's determination to remove the child from the foster care home. If the foster parents do not request a hearing, and are therefore in agreement with the transfer, there is no purpose to the hearing. The failure to request such a hearing is the best evidence that a hearing is not necessary.

The City's procedure satisfies the claims of the original counsel for the plaintiffs, who only sought to have pre-removal hearings provided to foster parents who requested them (see Joint Appendix 21a-23a, 29a, 32a; plaintiffs memorandum of law in support of motion for declaratory judgment and preliminary injunction, at pp. 26-27). As Judge Pollack noted in his dissent, the District Court's mandate that a hearing be provided even when not requested by foster parents has come as a surprise to all the parties (dissenting opin. at pp. 5-6). The District Court's direction that a hearing be provided even when not requested by a foster parent is apparently based on the assumption, without any proof in the record, that the professionals charged with the responsibility of operating the

foster care program will act adversely to the child. A statistical evaluation of the hearings under these new procedures does not support this conclusion. As we noted above, since the implementation of the new procedure in 1974, there have been only 26 hearings. There are approximately 2800 transfers a year.

The City's procedures properly do not require a hearing where the child is to be returned to the natural parent. As we discussed above (supra, p. 23), in New York State, in the absence of abandonment, statutory surrender or a judicial finding of unfitness, the child must be returned to his natural parents. A due process hearing would place the natural parents in an unfair position since it would improperly compel them, in an administrative proceeding, to

justify their rights to their own children. This would be contrary to the purpose of foster care to return the children to the natural parents as soon as the parents are ready to care for them.

Since the implementation of the new procedure, only seven foster parents have sought review of decisions to return foster children to their natural parents, despite the fact that there have been almost two thousand such decisions since 1974. In view of this history, it is unnecesary to require a hearing where the child is to be returned to its natural parents. To require natural parents to participate in such hearings would inevitably result in emotional confrontations between the foster parents and natural

parents, to the detriment of the child.

Where a hearing is held to determine whether a child should be transferred from one foster home to another, the City's procedure properly refuses to allow the natural parent to participate. The natural parents, who at this point have no desire to have the child returned to them, would not add anything of substance to the proceeding and their participation would only result in delay and confusion on the narrow issue before the hearing officer.

CONCLUSION

THE ORDER APPEALED FROM SHOULD BE REVERSED AND A DECLARATION OF CONSTITUTIONALITY DIRECTED IN FAVOR OF THE CHALLENGED STATUTES AND REGULATION.

December 17, 1976.

Respectfully submitted,

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